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2005

TRANSPORTATION BOARD

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CRANBERRY COURT

212 NORTH THIRD STREET

POST OFFICE BOX 11998

HARRISBURG, PENNSYLVANIA 17108-1998



FILE NO.

213443

35164

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FEB 25 2005

Part of  
Public Record

February 25, 2005

Vernon A. Williams, Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20006

VIA FED EX

**RE: STB Docket No. AB-55 (Sub-No. 568X)  
CSX Transportation, Inc. -- Abandonment  
Exemption in Franklin County, Pennsylvania**

Dear Mr. Williams:

TRANSPORTATION BOARD

We represent New Franklin Properties, LLC ("NFP").

Enclosed herewith please find an original and 11 copies of NFP's Petition, Pursuant to 49 C.F.R. §1117.1, for Reconsideration of the Board's Decision Issued on July 8, 2004, and, Pursuant to 49 C.F.R. §1152.25(e), to Reopen the Decision Served by the Board on March 9, 1999, to Permit the Filing of an Offer of Financial Assistance, *Nunc Pro Tunc*.

Please note that we have respectfully requested the Board to give expedited consideration to NFP's Petition, and that NFP has requested a stay.

Please file the original and 10 copies, and stamp and return one of the copies to us in the enclosed self-addressed, stamped envelope.

If you need anything further from us to complete the filing of the Petition, then please do not hesitate to contact me. Thank you for your courtesy and assistance in this matter.

**BECKLEY & MADDEN**

Vernon A. Williams, Secretary  
February 25, 2005  
Page 2

Very truly yours,

BECKLEY & MADDEN

By: 

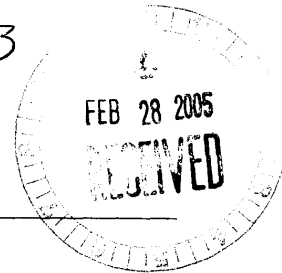
Charles O. Beckley, II

cc: Louis E. Gitomer, Esquire (via Fed Ex)  
Thomas J. Finucane, Esquire (via Fed Ex)  
Mr. Frederick Armstrong Fox

ORIGINAL

213443

BEFORE THE  
SURFACE TRANSPORTATION BOARD



DOCKET NO. AB-55 (SUB-NO. 568X)

ENTERED  
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Part of  
Public Record

CSX TRANSPORTATION, INC.  
ABANDONMENT EXEMPTION  
IN FRANKLIN COUNTY, PENNSYLVANIA

PETITION OF NEW FRANKLIN PROPERTIES, LLC, PURSUANT TO  
49 C.F.R. §1117.1, FOR RECONSIDERATION OF THE BOARD'S  
DECISION ISSUED ON JULY 8, 2004, AND, PURSUANT TO 49 C.F.R.  
§1152.25(E), TO REOPEN THE DECISION SERVED BY THE BOARD  
ON MARCH 9, 1999, TO PERMIT THE FILING OF AN OFFER OF  
FINANCIAL ASSISTANCE, *NUNC PRO TUNC*

EXPEDITED CONSIDERATION AND STAY REQUESTED

FILED

FEB 28 2005

SURFACE  
TRANSPORTATION BOARD

RECEIVED

FEB 28 2005

TRANSPORTATION BOARD

DATED: February 25, 2005

Thomas A. Beckley, Esquire  
Charles O. Beckley, II, Esquire

**BECKLEY & MADDEN**  
212 North Third Street  
P. O. Box 11998  
Harrisburg, PA 17108-1998  
(717) 233-7691

Attorneys for Petitioner  
New Franklin Properties, LLC

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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DOCKET NO. AB-55 (SUB-NO. 568X)

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CSX TRANSPORTATION, INC.  
ABANDONMENT EXEMPTION  
IN FRANKLIN COUNTY, PENNSYLVANIA

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**PETITION OF NEW FRANKLIN PROPERTIES, LLC, PURSUANT TO  
49 C.F.R. §1117.1, FOR RECONSIDERATION OF THE BOARD'S  
DECISION ISSUED ON JULY 8, 2004, AND, PURSUANT TO 49 C.F.R.  
§1152.25(E), TO REOPEN THE DECISION SERVED BY THE BOARD  
ON MARCH 9, 1999, TO PERMIT THE FILING OF AN OFFER OF  
FINANCIAL ASSISTANCE, *NUNC PRO TUNC***

**EXPEDITED CONSIDERATION AND STAY REQUESTED**

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AND NOW comes New Franklin Properties, LLC ("NFP"), which, by and through its attorneys, Thomas A. Beckley, Esquire, Charles O. Beckley, II, Esquire, and Beckley & Madden, of Counsel, files this Petition, Pursuant to 49 C.F.R. §1117.1, for Reconsideration of the Board's Decision issued on July 8, 2004, and, Pursuant to 49 C.F.R. §1152.25(e)(4), to Reopen the Decision Served by the Board on March 9, 1999, to Permit the Filing of a New Offer of Financial Assistance, *Nunc Pro Tunc*, and in support thereof avers as follows:

## I. BACKGROUND

1. CSXT commenced this proceeding on November 16, 1998, by filing a petition for exemption. CSXT sought to exempt from the prior approval requirements of 49 U.S.C. §10903 its plan to abandon a portion of its railroad known as the Baltimore Service Lane, Lurgan Subdivision, extending from Fourth Street to Commerce Street in the Borough of Chambersburg, Franklin County, Pennsylvania.

2. For purposes of this petition, the section of rail line which CSXT seeks to abandon may be divided into three separate parts: **Segment 1**, which extends from Fourth Street (Valuation Station 1083+20, at milepost BAV-20.5) to Main Street (Valuation Station 1096+20, at approximately milepost 20.8); **Segment 2**, which extends from Main Street to South Street (Valuation Station 1122+30); and **Segment 3**, which extends from South Street to Commerce Street (Valuation Station 1182+72 at milepost BAV-22.4).

3. This petition filed by NFP concerns only Segment 1.

4. In its petition for exemption, CSXT indicated that Chambersburg Engineering Company was the only rail shipper located along the entire length of railroad which CSXT seeks to abandon. CSXT stated that, despite the abandonment, Chambersburg Engineering Company would not lose rail service, because CSXT planned to reclassify the Fourth Street to Main Street Section (Segment 1) as industrial sidetrack.

5. On March 9, 1999, the Board served a Decision which granted CSXT's petition for exemption and established March 19, 1999, as the deadline for filing offers of financial assistance. At the request of the Borough of Chambersburg ("the Borough"), the Decision included a notice of interim trail use for the portion of CSXT's line extending from Main Street

to Commerce Street (Segments 2 and 3). The Borough did not file a trail use request for Segment 1.

6. On March 12, 1999, Frederick A. Fox, Kaye A. Fox, Frederick Armstrong Fox and Karla M. Fox ("the Foxes") timely filed an Offer of Financial Assistance ("OFA"), pursuant to which they sought to purchase the Main Street to South Street Section (Segment 2) of CSXT's railroad. On March 23, 1999, the Board served a Decision which found the Foxes to be financially responsible, and postponed the effective date of the exemption authorizing the abandonment of Segment 2 of the line, in order to allow the OFA process to proceed.

7. By letters filed on April 9, 1999, by CSXT, and on April 22, 1999, by the Foxes, the parties informed the Board that they had agreed that CSXT would sell Segment 2 to the Foxes for the purchase price of \$54,572.00. Thereafter, on May 7, 1999, the Board served a Decision which authorized the Foxes to purchase Segment 2 from CSXT, and dismissed CSXT's petition for exemption for Segment 2, effective on the date of the sale's consummation. (The sale of Segment 2 could not be consummated immediately because it formed part of CSXT's main line through Chambersburg, and it could not be abandoned by CSXT until improvements to Norfolk Southern's line, which CSXT and Norfolk Southern had agreed to share, were completed.)

8. By letter dated February 9, 2001, CSXT informed Counsel for the Foxes that:

Recently, we learned that Chambersburg Engineering no longer desires rail service to their facility, which is located between Fourth Street and Main Street. As there is no longer a purchaser for the rail between Fourth Street and Main Street [Segment 1], it is CSXT's intention to remove these track materials upon consummation of its abandonment authority.

Removal of these rail materials will leave your clients with an isolated railroad....

*(February 9, 2001, Letter from CSXT to Charles O. Beckley, II, Esquire).*

9. Faced with the prospect that Segment 2 would be cut off from CSXT's main line, on February 22, 2001, the Foxes filed a letter with the Board in which they requested permission to withdraw their OFA. In a decision served on March 30, 2001, the Board granted the Foxes' request and terminated the OFA process.

10. On July 5, 2001, however, CSXT, through its Counsel, informed the Foxes' Counsel that Chambersburg Engineering Company had reconsidered its need for rail service, and that Segment 1 would remain in place. Consequently, by letter dated July 19, 2001, the Foxes requested the Board to reinstate their OFA for Segment 2.<sup>1</sup>

11. On September 10, 2001, the Board served a Decision granting the Foxes' request, and reinstating their OFA for Segment 2.

12. In December, 2001, or January, 2002, Chambersburg Engineering Company ceased operations and went out of business.

13. Thereafter, on July 30, 2002, Chambersburg Engineering Company conveyed its real property -- which is the only property served by Segment 1 of CSXT's line -- to NFP. This property consists of approximately 25 acres and approximately 250,000 square feet of warehouse, office and industrial building space. It is now principally occupied by Gaumer Industries, which manufactures and distributes nationally chassis and suspension components for heavy trucks and other vehicles.

14. Due to this change in circumstances, i.e. Chambersburg Engineering Company's demise and NFP's acquisition of its real property, on August 15, 2003, Frederick A. Fox, Kaye A. Fox and Frederick Armstrong Fox filed with the Board a Petition to Amend their Offer of

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<sup>1</sup> By a separate letter dated July 19, 2001, addressed to Natalie S. Rosenberg, Esquire, CSXT's in-house Counsel, the Foxes offered to purchase Segment 1 directly from CSXT, outside of the OFA process, for \$23,534.00, the price for which CSXT had previously indicated it would sell Segment 1.

Financial Assistance, or, Alternatively, to Reopen the Decision Served by the Board on March 9, 1999, Pursuant to 49 C.F.R. §1152.25(e), to Permit the Filing of a New Offer of Financial Assistance, *Nunc Pro Tunc*.

15. On September 11, 2003, the Foxes filed with the Board a Motion for an Order Staying CSXT's Right to Exercise its Abandonment Authority for Segment 1 of its line, pending the Board's disposition of the Foxes petition to amend their OFA.

16. On September 12, 2003, the Borough of Chambersburg filed a reply opposing the Foxes' petition to amend their OFA, and a reply opposing the Foxes' motion for stay.<sup>2</sup>

17. In its reply, the Borough suggested that, since NFP, and not the Foxes, owned the property served by Segment 1, the Foxes lacked standing to seek to amend their OFA to include Segment 1.

18. Accordingly, on September 23, 2003, NFP, which is a Pennsylvania limited liability company wholly-owned by Frederick Armstrong Fox, petitioned to intervene in this matter. NFP joined in the Foxes' petition, and asked that the relief requested therein be granted. Alternatively, as the new owner of the property served by Segment 1, NFP asked that it be permitted to file its own OFA for Segment 1. (NFP hereby incorporates herein by reference as though set forth in full the Petition to Intervene that it filed with the Board on September 23, 2005.)

19. On or about October 11, 2003, the Borough filed a response to NFP's petition to intervene. The Borough did not oppose NFP's intervention in this proceeding, but the Borough did oppose the granting of both the Foxes' petition, and NFP's request to file its own OFA for Segment 1.

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<sup>2</sup> On September 17, 2004, the Board entered an order granting the Foxes' request for a stay.



20. CSXT did not oppose either the Foxes' or NFP's petition.

21. On January 20, 2004, the Board served a Decision relating to the Foxes' and NFP's petitions. The Board first noted that, where circumstances warrant, permitting a late-filed OFA can be consistent with Congress' intent to allow a financially responsible party to maintain rail service over a line otherwise scheduled for abandonment:

Through the OFA program, Congress sought to preserve rail service for the shipping public over a rail line that would otherwise be authorized for abandonment, while allowing an owner that is losing money on the line to sell it for fair market value, by conferring upon financially responsible parties a right to acquire such a rail line for the constitutional minimum value of the property....In interpreting and administering the OFA provisions, including the time frame for submitting an OFA, the Board seeks to accommodate and harmonize Congress' dual objectives of preserving rail service where possible, while protecting the owning railroad from bearing the costs associated with unreasonable delay.

*As the history of this case illustrates, there can be situations in which allowing a late-filed OFA may be consistent with both of Congress' objectives.*

*January 20, 2004, Decision of the Board, p.p. 3-4 (citations omitted)(emphasis added).*<sup>3</sup>

22. While acknowledging that the circumstances relating to Segment 1 and the property served thereby had changed, the Board nevertheless concluded that it did not have sufficient evidence before it to determine whether or not to permit the Foxes' or NFP to file an OFA for Segment 1. Consequently, the Board directed the Borough and NFP to submit additional evidence to the Board relating to their respective plans for Segment 1:

Now, some 4 years after the allotted time for filing OFAs, the status of Segment 1 has changed yet again, causing the Foxes to seek, for the first time, to submit an OFA for that line segment.

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<sup>3</sup> NFP notes that this is not a case in which CSXT sought to abandon a portion of its line because it was losing money. Rather, CSXT requested permission to abandon Segments 1-3 in order to facilitate an effort to remove nine at-grade crossings in the Borough of Chambersburg. Permitting NFP to file an OFA for Segment 1 would not interfere with that goal.

*CSXT does not object, but the Borough does....* Given the continually changing status of the property, and the sparse record that has been presented on the issue, the Board does not have an adequate basis upon which to determine whether permitting a late-filed OFA for Segment 1 here would be consistent with Congress' intent....Accordingly, the parties are directed to provide additional evidence about their respective plans for Segment 1 and how they intend to pursue those plans if afforded the opportunity, so that the Board will have a sufficient record upon which to assess the public interest in this situation.

*January 20, 2004, Decision of the Board, p. 4 (emphasis added).*

23. The Board directed the parties to submit supplemental evidence to the Board by no later than February 9, 2004, and permitted each party to submit a reply by no later than February 19, 2004. (At the request of the Foxes, in a Decision served on February 6, 2004, the Board extended these dates to February 17 and 27, 2004.)

24. On February 17, 2004 Frederick Armstrong Fox filed an affidavit on behalf of the Foxes and NFP. (NFP hereby incorporates herein by reference as though set forth in full the Affidavit submitted by Frederick Armstrong Fox on February 17, 2004.)

25. In Paragraph 37 of his Affidavit, Mr. Fox summarized the reasons why the Foxes and/or NFP sought to acquire Segment 1 of CSXT's rail line:

37. [W]e have asked the Board to allow us to acquire Segment 1 of CSXT's Line through the OFA process for four principal reasons:

(a) First, my company, New Franklin Properties [NFP], now owns the former Chambersburg Engineering Company [CECO] property, which is the only property served by Segment 1. Rail access constitutes an integral part of the property's infrastructure. It is part of what my company purchased, and one of the reasons why it made the acquisition. The capacity to receive and dispatch rail shipments enables us to make full use of the facility's large industrial buildings, which are equipped with overhead cranes suited to moving large, heavy objects, many of which can only be transported economically by rail. Even if I did not anticipate a need for rail service for GI [Gaumer Industries]

and GCE's [Gaumer Chassis Engineering] manufacturing operations, I would want to preserve rail service to the property in order to maintain the ability to attract the kind of tenants who need large open buildings equipped with overhead cranes. Without rail service, we could not make full use of all of the property's facilities. I want to purchase Segment 1 of CSXT's Line to ensure that the former CECO property retains its unique character as a heavy industrial facility, and to prevent the buildings and equipment on the property, which are best suited to a large scale industrial or logistics use, from becoming obsolete because the facility no longer has access to rail service. In short, I want to protect the substantial investment that I have made.

(b) Second, I view maintaining access to rail service as being absolutely critical to the long term survival of GI's manufacturing business. As GI increases its production capacity, GI's ability to continue to make its own castings -- which allows me carefully to control both the quality and availability of GI's product -- will depend largely upon GI's ability to purchase raw materials competitively. I believe that preserving GI's capability to receive rail shipments, which will permit me to purchase OTM and wrought steel products in quantities that can only be transported economically by rail, will enable GI to remain competitive with offshore parts manufacturers.

(c) Third, we want to preserve rail service to our Black Avenue properties, which are served by Segment 2 of CSXT's Line, in order to maximize our pool of potential tenants. By purchasing Segment 1, we can ensure that Segment 2 remains connected to the national rail network.

(d) Finally, from the inception of this proceeding, the reason given by CSXT for its decision not to remove Segment 1, and instead to preserve it as industrial sidetrack, was to preserve rail service to the Chambersburg Engineering Company. Again, my company, New Franklin Properties, now owns the former Chambersburg Engineering Company property. Segment 1 includes two bridges, and will require regular inspections and maintenance. We have both the means and the desire to maintain Segment 1 in a condition suitable for rail service. As the owner of the property which Segment 1 serves, and as the future owner of Segment 2, we feel it simply makes sense to permit us to purchase Segment 1 from CSXT through the OFA process.

*(February 16, 2004, Affidavit of Frederick Armstrong Fox, p.p. 14-15).*

26. Mr. Fox also explained in his affidavit why he believes that it is important for his company, as opposed to the Borough, to own Segment 1:

If the Borough purchases Segment 1 from CSXT outside of the OFA process, then my understanding is that the Borough would have no legal obligation to provide us with access to Segment 1, and that we would have to negotiate a sidetrack agreement with the Borough. To state the matter plainly, having already made a substantial investment in both the CECO and the Black Avenue properties, we do not want to find ourselves in a position where the Borough, or some other public entity, which has no stake in our success or failure, controls our access to rail service. That is why we have committed the time and significant resources to seeking the Board's permission to purchase...Segment 1...through the OFA process.

(*Id.*, at ¶38, p. 16).

27. On or about February 17, 2004, the Borough filed with the Board the Affidavit of Eric Oyer, the Borough Manager.

28. CSXT made no filing with the Board on February 17, 2004.

29. On February 27, 2004, the Foxes and NFP filed a Reply to the Affidavit submitted by the Borough. (NFP hereby incorporates herein by reference as though set forth in full the Reply filed by the Foxes and NFP on February 27, 2004.)

30. In their Reply, the Foxes and NFP noted, *inter alia*, that the Borough's affidavit identified no reason why the Borough needs rail access, and contained no commitment to maintain Segment 1, which includes two bridges, in a condition suitable for rail service. The Foxes and NFP, on the other hand, had stated unequivocally to the Board that they would maintain Segment 1 in a manner suitable for rail operations, and had explained specifically what motivated their desire to maintain access to rail service.

31. The Borough filed a response to Mr. Fox's affidavit on February 27, 2004. The Borough's response did not take issue with the Foxes' need for rail service, nor did it include a commitment to maintain Segment 1 in a condition suitable for rail operations.

32. Also on February 27, 2004, CSXT, for the first time, took a position concerning the Foxes' and NFP's request for permission to file an OFA for Segment 1. In a document styled as a "reply," CSXT indicated that it "does not believe that it is appropriate to sell Segment 1 through the OFA process." (*February 27, 2004, Reply of CSX Transportation, Inc.*, p. 8).

33. CSXT opposed the Foxes' and NFP's request for permission to file an OFA to purchase Segment 1 because CSXT ostensibly wanted to conclude this matter quickly, and CSXT objected to the alleged delay that it believed that submission of an OFA for Segment 1 would engender. (When it filed its reply on February 27, 2004, CSXT had already requested and received 11 separate extensions of time in which to consummate the abandonment.)

34. Specifically, CSXT stated that: "CSXT seeks an expeditious end to this abandonment proceeding, which began on November 16, 1998;" that "CSXT would like to expeditiously consummate the OFA;" that "CSXT is also anxious to dispose of Segment 1;" that "it could be five months after the Board's decision before CSXT sold Segment 1 to the [Foxes] or NFP;" and that "CSXT respectfully requests that the Board expeditiously decide this proceeding." (*February 27, 2004, Reply of CSX Transportation, Inc.*, p.p. 1, 6, 7, 8 and 9).

35. CSXT did not in its reply question Gaumer Industries' or Gaumer Chassis Engineering's need for rail service, nor did CSXT offer any substantive reason – other than delay – why the Foxes or NFP should not be permitted to acquire Segment 1 through the OFA process.

36. On March 4, 2004, the Foxes and NFP filed a motion to strike CSXT's reply as being untimely, not in conformity with the Board's January 20, 2004 Decision, and non-responsive to

the affidavits filed by the Foxes, NFP and the Borough. (NFP hereby incorporates herein by reference as though set forth in full Motion to Strike filed by the Foxes and NFP on March 4, 2004.)<sup>4</sup>

37. In their motion to strike, the Foxes and NFP pointed out that, despite CSXT's protestations concerning delay, CSXT had asked for and received numerous extensions of time to consummate the abandonment; that neither the Foxes nor NFP had caused any of the delays that CSXT had encountered; and that the Foxes had been waiting almost two-and-a-half years for CSXT's response to their comments on a proposed agreement of sale for Segment 2.

38. CSXT filed a response to the Foxes' and NFP's motion to strike on March 18, 2004. CSXT repeated its mantra of wanting to conclude this matter as quickly as possible: "As explained by CSXT in its February 27 Reply, CSXT seeks to dispose of Segment 1 expeditiously, nearly five and one-half years after it first sought abandonment;" "The February 27 Reply stated CSXT's position with regard to its desire to quickly dispose of Segment 1;" "CSXT is now interested in the expeditious sale of Segment 2 to the Foxes under the OFA process and the disposition of Segment 1." (*March 18, 2004, Reply of CSX Transportation, Inc., to Motion to Strike*, p.p. 4, 5).

39. On July 8, 2004, the Board served a Decision denying the Foxes and NFP permission to file an OFA for Segment 1. The Decision contained very little analysis, and appeared to be based solely upon CSXT's sudden opposition to the Foxes' and NFP's request. For example, the Decision did not discuss: (a) the change in circumstances represented by NFP's acquisition of the property served by Segment 1; (b) the Borough's failure to identify a legitimate railroad use for Segment 1; (c) the need for the two manufacturing companies involved, Gaumer Industries

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<sup>4</sup> Alternatively, the Foxes and NFP asked the Board to treat their motion to strike as a surreply to CSXT's reply.

and Gaumer's Chassis Engineering, to be able to receive shipments of raw materials by rail; (d) the Borough's failure to commit to maintain Segment 1 in a condition suitable for rail operations; or (e) the fact that CSXT has not been sustaining an operating loss by virtue of its continued ownership of Segment 1.

40. The Board also in its July 8, 2004, Decision directed the Foxes to complete their acquisition of Segment 2 on or before August 9, 2004.

41. On July 22, 2004, despite its repeated declarations that it wanted to complete this matter "expeditiously," CSXT filed its twelfth request for an extension of time with the Board. CSXT asked the Board to extend both the time to consummate the abandonment, and the NITU negotiating period, until January 30, 2005.

42. On July 27, 2004, the Board served a Decision granting CSXT's twelfth extension request.

43. On August 6, 2004, because the Board denied the Foxes' and NFP's request to file an OFA for Segment 1, the Foxes withdrew their OFA for Segment 2. As a result, the Foxes forfeited a \$13,500.00 deposit on Segment 2 that they had previously paid to CSXT.

44. On January 26, 2005, CSXT filed its thirteenth request for an extension of time. **CSXT asked that the time to consummate the abandonment be extended by 240 days, until September 27, 2005, and that the NITU negotiating period be extended by 180 days, until July 29, 2005.**

45. On January 28, 2005, the Board served a Decision granting CSXT's thirteenth extension request.

## II. RELIEF REQUESTED

46. NFP respectfully requests the Board to reconsider its July 8, 2004, Decision. NFP further requests that the Board reopen its March 9, 1999, Decision to permit NFP to file an OFA, *nunc pro tunc*, for Segment 1 of CSXT's rail line.

47. A year ago, when CSXT at the eleventh hour opposed the Foxes' and NFP's request for permission to file an OFA for Segment 1 (after CSXT's in-house Counsel had said that it would not), it was, ostensibly, because CSXT wanted to conclude this matter quickly, and to avoid the delay that CSXT felt might be associated with allowing the Foxes or NFP to acquire Segment 1 through the OFA process.

48. Since that time, however, CSXT has requested and received two additional extensions of time to consummate its abandonment, which together total 14 months. Now CSXT need not consummate the abandonment of Segment 1 until September 27, 2005, i.e. not for another seven months – assuming, of course that CSXT does not request yet another extension.

49. Given its own requests to enlarge the time within which to consummate the abandonment, CSXT can no longer be heard to complain that allowing NFP to submit an OFA for Segment 1 will unreasonably delay the conclusion of this matter. Even if the Board ultimately has to establish the price for Segment 1 (NFP does not believe that it will), NFP can easily complete the acquisition of Segment 1 through the OFA process prior to the current September 27, 2005, deadline.<sup>5</sup>

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<sup>5</sup> Indeed, in its February 27, 2004, "reply" to the Foxes' and NFP's request to submit an OFA for Segment 1, CSXT estimated that the process could take as long as five months. (*February 27, 2004, Reply of CSX Transportation, Inc.*, p. 8, n. 11). Assuming, *arguendo*, that this is true, NFP could complete its acquisition of Segment 1 through the OFA process by the end of July, 2005, two months prior to the current September 27, 2005, deadline.



50. Nor can CSXT be heard to complain that it is suffering prejudice because it is losing money by continuing to operate the line. CSXT has not provided rail service over Segment 1 in years.

51. Due to CSXT's repeated requests for extensions of time, this matter has now progressed well into its seventh year. During that period, the circumstances surrounding the property served by Segment 1 have changed dramatically. The Chambersburg Engineering Company closed its doors after more than 100 year of continuous operation. NFP now owns the only property served by Segment 1, and it is occupied by two truck suspension and chassis components manufacturers, Gaumer Industries and Gaumer's Chassis Engineering.

52. In order to further the rail transportation policy articulated by Congress in 49 U.S.C. §10101, the regulatory framework applicable to offers of financial assistance must retain the flexibility to adapt to changing circumstances relating to the ownership and use of real property served by a rail line.

53. The Board explicitly acknowledged this principle in its January 20, 2004 Decision, when it stated that, "[a]s the history of this case illustrates, there can be situations in which allowing a late-filed OFA may be consistent with...Congress' objectives." *January 20, 2004, Decision of the Board*, p. 4.

54. The Board also recognized that, "[t]hrough the OFA program, Congress sought to preserve rail service for the shipping public over a rail line that would otherwise be authorized for abandonment...by conferring upon financially responsible parties a right to acquire such a rail line for the constitutional minimum value of the property." *January 20, 2004, Decision of the Board*, p. 3.

55. Gaumer Industries and Gaumer's Chassis Engineering are the only two businesses along the portion of CSXT's line to be abandoned that have expressed a desire to maintain access to rail service.

56. Due to increased sales and the rapidly escalating cost of the steel that GI and GCE use in their casting operation, GI and GCE have a present need for rail service. To accommodate rail deliveries, the track on NFP's property will need to be upgraded and repaired. NFP is fully prepared to undertake this expense, but it does not wish to do so unless it knows it can control its access to rail service through the ownership of Segment 1.

57. Permitting NFP to file an OFA for Segment 1 will not prejudice CSXT. CSXT is not suffering an operating loss associated with the line because it is not currently providing rail service; NFP will be required to pay to CSXT the constitutional minimum value of the line; and, given CSXT's most recent extension requests, allowing NFP to file an OFA for Segment 1 at this juncture will not delay, unreasonably or otherwise, the conclusion of this matter.

58. Permitting NFP to file an OFA for Segment 1 will also not prejudice the Borough. As the papers filed by the Borough in opposition to the Foxes' and NFP's previous request made clear, the Borough has no legitimate railroad use for Segment 1. Segment 1 serves only one property, the property owned by NFP and occupied by GI and GCE.

59. Moreover, because the Foxes and NFP no longer seek to purchase Segment 2, allowing NFP to submit an OFA for Segment 1 will neither interfere with the Borough's plan to convert Segment 2 into a recreational trail, nor preclude the removal of the at-grade crossing at Main Street. (As noted previously, the Borough has never submitted a trail request for Segment 1, and Segment 1 does not include the Main Street crossing.)

60. Finally, as a matter of law, any private agreement reached between the Borough and CSXT relating to Segment 1 – neither the Foxes nor NFP has ever seen any evidence of the existence of such an agreement – cannot trump or displace the OFA process. *See* 49 U.S.C. §10904; 49 C.F.R. §1152.27.

61. NFP stands committed to maintain Segment 1 in a condition suitable for rail service. (The Borough has never made such a commitment.) The Board has previously found Frederick Armstrong Fox to be financially responsible. Mr. Fox guarantees the financial responsibility of NFP.

62. As NFP argued previously to the Board, it simply makes sense for the owner of the only property served by Segment 1 to own Segment 1. Frankly, given the continuing erosion of America's industrial base by foreign competition, it just should not be this difficult for the owner of a large industrial facility, which houses two heavy manufacturing operations, to use its own money (not taxpayer dollars) to preserve rail service to its property.

63. For all of these reasons, pursuant to 49 C.F.R. §1117.1, NFP respectfully requests the Board to reconsider its Decision served on July 8, 2004, and, pursuant to 49 C.F.R. §1152.25(e)(4), to reopen its Decision served on March 9, 1999, to permit NFP to file, *nunc pro tunc*, an OFA for Segment 1 of the section of CSXT's rail line to be abandoned in the Borough of Chambersburg.

64. NFP also respectfully requests that the Board afford expedited consideration to this petition.

65. Finally, NFP respectfully requests the Board to stay CSXT's right to exercise its abandonment authority for Segment 1, pending the Board's disposition of this petition.

DATED: February 25, 2005

Of Counsel

**BECKLEY & MADDEN**

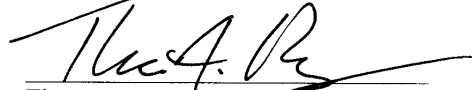
212 North Third Street

P. O. Box 11998

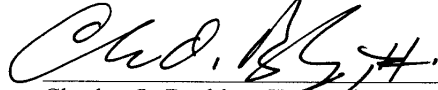
Harrisburg, Pennsylvania 17108-1998

(717) 233-7691

Respectfully submitted,



Thomas A. Beckley, Esquire



Charles O. Beckley, II, Esquire

Attorneys for Petitioner New

Franklin Properties, LLC

**CERTIFICATE OF SERVICE**

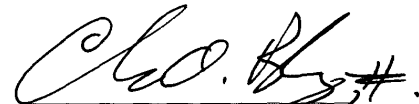
I Charles O. Beckley, II, Esquire, hereby certify that a copy of the foregoing document was served this day upon the persons and in the manner indicated below:

**SERVICE BY FED EX:**

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DATED: February 25, 2005



Charles O. Beckley, II, Esquire